Office Supreme Court, U.S.
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JUL 1 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 172

HOLLY JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF JOSEPH HENRY FAIL, DECEASED, PETITIONER,

versus

MORGAN F. LIVINGSTON, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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ARGUMENT

The first paragraph of Respondent's Reply Brief in the Court of Appeals was as follows:

> "The defendant-appellant realizes that the facts must be viewed in a light most favorable to the Plaintiff-Appellee and that he is entitled to all reasonable inferences and presumptions arising from the facts. However, the facts as reflected in plaintiff-appellee's brief and the inferences drawn therefrom are unwarranted by the record. Some of these discrepancies are pointed out at this time in appellant's reply brief in order that in the event they do exist appellee may direct the Court in oral argument to the portion of the transcript which contains the facts as relied on by appellee. * * *"

The Court of Appeals questioned counsel for Petitioner at length to point out the parts of the record relied upon to support the views and inferences drawn by him. The Court of Appeals properly concluded by its opinion that there were no facts or inferences that would support a verdict against the Respondent, Livingston. Petitioner's brief again sets forth unwarranted inferences and deductions and strongly and repeatedly urges in his brief that the Court overlook the *res gestae* statements. There is no *res gestae* in the record. What Petitioner refers to is a statement made to a highway patrolman about one and one-half hours after the accident by the Respondent's co-defendant, which statement was as follows:

> "* * * He said that he had been down the road around Ehrhardt with this '47 Ford 2 truck and it had broken down with him, and that he had been down there to tow it back to Livingston for Mr. Livingston, that it belonged to Mr. Morgan Livingston. For some little time there, Raymond stated that he did not know who was steering this stake-bodied truck. He said he had picked the man up down there at Ehrhardt to steer it back for him. But after talking to him, he finally stated that his son-in-law,—I believe his name is Pou—was steering the stake-bodied truck for him—Bradly Pou. * * *" (Tr. 26.)

Upon cross examination the highway patrolman said:

> "* * * Q. Was that the same night at the scene of the accident?
>
> A. The same night, yes, sir. He stated that Mr. Livingston didn't know that he had been to Ehrhardt in the truck. * * *" (Tr. 39.)

There are at least three reasons why this should not be considered as establishing agency: (1) The statement when carefully examined does not say any more than is conceded: that is, that the truck belonged to Mr. Livingston; (2) The statement could not carry any more weight than the subse-

quent statement, neither being a part of the *res gestae*, emphatically stating that Mr. Livingston did not know that he had been to Ehrhardt in the truck; and (3) Any statements made to the highway patrolman at the time (one and one-half hours after the accident) are not competent evidence of agency. This identical point was recently decided by the South Carolina Supreme Court in the case of *Marshall v. Thomason*, 127 S. E. (2d) 177, 241 S. C. 84. The Petitioner, in his brief, does not mention this recent case which is directly in point as to both agency and *res gestae* but cites as authority the case of *Chantry v. Pettit Motor Company*, (1950) 156 S. C. 1, 152 S. E. 753, which facts do not resemble the case before this Court, and deals with a statement made "immediately after the collision."

The Court of Appeals, obviously finding no evidence to support Petitioner's case, then went one step further and reviewed some of the evidence relied upon by Respondent and in its opinion pointed out the overwhelming evidence on behalf of the Respondent.

Petitioner states that the Court of Appeals has ignored the allegation in his complaint:

> "(a) In the defendant, Morgan F. Livingston, allowing the 1949 Ford stake body truck to be operated upon the highways of this State when he knew or should have known that it was in an unsafe condition." (Emphasized.)

The Court of Appeals could have properly found against Petitioner on this issue as a matter of law but instead chose to point out in the last paragraph of its opinion the absence of evidence supporting this theory of the case.

Assuming, for the purpose of argument only, that the truck had a defective tail-light, and assuming further that the Respondent knew or should have known of this condi-

tion, and assuming further that there was evidence that the alleged defective tail-light was the proximate cause of the accident; assuming all of these things, then note the word "allowing" in Petitioner's complaint which is quoted above. There is not one scintilla of evidence that the Respondent **allowed** his co-defendant to operate the stake body truck on the night in question. What limited authority existed did not encompass such personal use as this, and what limited authority which had been previously given was specifically withdrawn prior to the collision and there is no evidence to the contrary, nor is there any evidence submitted upon which any other conclusion could be reached.

The accident took place in South Carolina; therefore, we must look to South Carolina law, and this point has been considered by the south Carolina Supreme Court in the case of *Holder v. Haynes*, (1940), 193 S. C. 176, 7 S. E. (2d) 833, wherein the South Carolina Supreme Court quotes from the case of *Hunt v. Chisholm*, La. App. (1938) 183 So. 132:

> "While it was also contended that defendant should be held liable because the injury was caused by a defective, dangerous instrumentality owned by him and operated with his consent, express or implied, the Court declared: 'Of course a car operated at night in a populous city without lights is a very dangerous agency. But as defendant did not know of the illegal use being made of his car and did not know its lights were not burning, surely he cannot be held responsible for damages directly resulting from the car being operated under such conditions'."

This case is also cited in 122 A. L. R. at page 862 and in addition, A. L. R. cites the following case:

> "Again, in *Reddy-Waldhauer-Maffett Co. v. Spivey* (1936), 53 Ga. App. 117, 185 S. E. 147, *supra*, VII, plaintiff in attempting to establish the liability of defendant company did not rely solely on the relationship of mas-

ter and servant between it and a truck driver in its employ, but contended that defendant was also liable on the theory that it permitted a defective vehicle to be placed in the hands of another party, alleging the absence of a proper red rear light on defendant's truck. The court held, however, that **the fact that the machine was defective did not create an exception to the general rule that the owner of a car who was not present at the infliction of an injury could not be made liable, unless it were shown that the person in charge not only was the agent of the owner, but also was engaged at the time in the business of his master.** It was declared: 'The fact that the defect in the car was that it did not have a rear, red light attached, even if known to the owner would not in this case create a liability on the part of the owner, where the owner on the night in question did not know the employee would use the car'." (Emphasized.)

In 1957 the Supreme Court of South Carolina reaffirmed the principles set forth in *Holder v. Hames, supra*, by citing it as authority in the case of *Houle v. McDaniel*, 101 S. E. (2d) 255, 232 S. C. 125. The Supreme Court of South Carolina stated therein as follows:

> "It is manifest from the foregoing that at the time of the accident Brown was not acting within the scope of his duties as Mr. Howle's employee, but was using the car for his own purposes in nowise connected with such employment. His contributory negligence, if any, could not, therefore, be imputed to Mr. Howle under the doctrine of *respondeat superior*. *Holder v. Hames*, 193 S. C. 176, 7 S. E. (2d) 833, * * *"
>
> "In the operation of the Ford car at the time of the accident Brown was neither servant nor agent of Mr. Howle. Their relationship was that of bailor and bailee; and Brown's contributory negligence, if any, was therefore not imputable to Howle. 8 C. J. S. Bailments, § 40, p. 318, Section 56, p. 373; 60 C. J. S. Motor Vehicles, § 439, p. 1108; Am. Jur. Bailments, Section 310, p. 407; 5A Am. Jur., Automobiles and Highway

Traffic, Section 635, p. 627. Annotations: 6 A. L. R. 316 et seq., 22 A. L. R. 1246, 1248.

Liability of a bailor for injury to a third person by the bailed property in the possession of the bailee rests, not upon the bailee's negligence, but upon that of the bailor himself. Thus a bailor may be liable to a third person so injured where he has entrusted a dangerous article to one whom he knows, or to be ignorant of its dangerous quality, or an automobile to one whom he knows to be so reckless or incompetent that danger to third persons would be a reasonably probable consequence of his operation of it. So also may the bailor incur liability if injury to the bailee or another is proximately caused by a dangerous hidden defect in the bailed article, of which the bailee had no knowledge or reason to know, but which was known to the bailor at the time of the bailment. 6 Am. Jur., Bailments, Sections 314, 316, pp. 411, 413. But nothing in the evidence here warrants inference of liability on the part of the bailor under this rule." (Neither is there any such evidence in this case.)

Petitioner contends further that in view of Rule 50 of the Federal Rules of Civil Procedure, that the Court of Appeals was without authority to review the facts of the case as they pertain to the allegations of the complaint in regard to the "allowing the 1949 Ford stake body truck to be operated upon the highways * * * in an unsafe condition."

It should be pointed out that there is no evidence that the respondent **allowed** his truck to be operated on the night in question and as has been pointed out, all of the evidence is to the contrary and all of the evidence points inevitably to the fact that the truck was being operated **without authority** from the Respondent. When Petitioner failed to establish that the truck was being operated by authority of the Respondent and when all of the evidence pointed directly to the contrary conclusion, then obviously Peti-

tioner's contention that Respondent allowed his truck to be operated in an unsafe condition must also fail.

Assuming, for the purpose of argument only, that the logic set forth by the South Carolina Supreme Court in the case of *Holder v. Hames*, *supra*, is improper for some reason, it is readily apparent that Respondent did, in fact, comply with Rule 50 of the Federal Rules of Civil Procedure.

At the conclusion of all of the testimony the Respondent moved for a directed verdict and argued that the co-defendants were "forbidden" to drive the truck at the time in question, and the trial judge, at page 259 of the transcript, stated as follows:

"I would have to overrule the motion as far as the agency is concerned.

"The other matters would apply to all of the defendants' motions and that is as to actionable negligence. . . ."

Respondent's notice of motion was as follows:

"NOTICE OF MOTION

"NOTICE IS HEREBY GIVEN That the defendant, Morgan F. Livingston intends to and does hereby move under Rule 50 (b) to have judgment entered in accordance with his motion for a directed verdict. The said motion is made upon the grounds urged in his motion for a directed verdict, namely:

"(b) That there is no evidence that the defendants, Raymond Barnes and Bradley E. Pou, were operating the vehicles owned by the defendant, Morgan F. Livingston, at the time of the incident out of which this action arises, as the agent or servant of Morgan F. Livingston, or within the scope of their authority, but on the contrary the only reasonable inference to be drawn from the testimony was that the defendants, Raymond Barnes and Bradley E. Pou, were operating the vehicles involved not as the agent and servant of

Morgan F. Livingston **and without his authority**. (Emphasis added.)

/s/ MARSHALL B. WILLIAMS
/s/ CHARLTON B. HORGER,
Attorneys for Defendant,
Morgan F. Livingston."

Orangeburg, S. C.,
April 18, 1962.

It would appear obvious from the foregoing that not only was the trial judge and all parties on notice of Respondent's contention that the trucks were being operated without his authority, but that even very technically speaking, Rule 50 of the Federal Rules of Civil Procedure was, in fact, complied with.

Rule 50 (b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts, and to provide an exclusive procedural program for the federal courts which had heretofore been governed by state procedure. *Johnson v. New York, N. H. and H. R. Company*, (1952), 344 U. S. 125.

The cases cited by Petitioner in support of his contention that Rule 50 had not been followed have been read but it would unduly lengthen this brief by referring to each of them and pointing out their lack of bearing upon this case. However, each of the cases cited by Petitioner are very easily distinguishable.

The cases cited by Petitioner in support of his contention of agency deal with the Federal Employers Liability Act. There is no disagreement with the law contained in those cases but they are not similar to the case under consideration. There are numerous similar cases which have been decided by the South Carolina Supreme Court and followed by the United States Court of Appeals for the Fourth Circuit. In view of this it would seem unnecessary

to resort to factual situations far different from the type of case under consideration. A number of these cases have been cited in Respondent's main brief to the Court of Appeals, two of which appear extremely similar to the case under consideration. They are *Holder v. Harris, supra;* and *Hoehle v. McDaniel, supra.*

CONCLUSION

No new law has been established by the Court of Appeals nor has Rule 50 of the Federal Rules of Civil Procedure been violated. The province of the jury has not been violated. The facts in each case of this type must be reviewed by the appropriate appellant tribunal. The Court of Appeals did so in this case and found no evidence to support Petitioner's case and rendered its opinion accordingly.

Petitioner has failed to show grounds for a writ of certiorari and accordingly his petition for such a writ should be denied.

Respectfully submitted.

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Orangeburg, South Carolina,
June 17, 1963.